

**BRAZILIAN POST-TRANSITIONAL JUSTICE
AND THE INTER-AMERICAN HUMAN RIGHTS SYSTEM**

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Thanks to the Brazil Institute, and to Anthony Pereira in particular, for the kind invitation.

My remarks will try to locate the Truth Commission in a broader context of post-transitional justice in Brazil. In particular, I will seek to address the question whether the Truth Commission – as set up – is likely to be sufficient for Brazil to meet its international obligations to ‘do transitional justice’, i.e. its international obligations to ensure truth and accountability with regards to its recent past.

More specifically, I will emphasise what types of transitional justice policies may be required from Brazil in light of the *Gomes Lund* ruling by the Inter-American Court of Human Rights from November 2010. I will draw out some key implications of what the ruling, and the Brazilian government's response to it, tell us about the prospects for and limitations on Brazilian post-transitional justice, and arguably, Brazilian democracy more broadly.

***Gomes Lund* and the Inter-American Human Rights System**

First, very briefly, what is *Gomes Lund* about; how and why did the case end up before the Inter-American Court; and why is it significant?

The *Gomes Lund* case is related to the Brazilian military's counterinsurgency campaign against militants of the Brazilian Communist Party, between April 1972 and January 1975 – in the area of the Araguaia river banks in the state of Pará. Members of the group were detained, and after being identified, they were killed and buried secretly. None of the individuals was acknowledged as dead, remaining in the status of persons who had disappeared for political reasons.

In the beginning of the 1980s, attempts by family members of some of the disappeared members of the guerrilla were blocked by the broad interpretation by judges of the 1979

Amnesty Law. The Amnesty Law, adopted as a measure to facilitate a political opening in Brazil, was initially targeting the political crimes committed by those struggling against the military regime, but the interpretation of the Law was extended to include military and police officials who had committed human rights violations.

In 1995, after several years of the case being passed back and forth between lower courts and courts of appeals, the relatives represented by several local and international human rights groups¹ submitted a petition against the Brazilian State to the Inter-American Commission on Human Rights (IACHR). The case was named for Júlia Gomes Lund, whose son Guilherme Gomes Lund, a member of the Araguaia guerrilla, disappeared in 1973 when he was 26 years old.

In October 2008, the Inter-American Commission finally found in favour of the petitioners, and in March 2009 it submitted the case to the Inter-American Court of Human Rights. The Commission argued, effectively, that the Brazilian government's unwillingness until then to declassify the documents on the military operations in the Araguaia region constituted a denial of the 'right to truth'. It also argued that the Brazilian Amnesty Law violated Brazil's international human rights obligations to the extent that it prevents the investigation, prosecution and punishment of serious human rights violations, including forced disappearances and extrajudicial executions.

The Inter-American Court ruling in *Gomes Lund*

In November 2010 the Inter-American Court published its ruling in *Gomes Lund*. In essence, the Court found that Brazil is responsible for the forced disappearance of 62 people between 1972 and 1974 in Araguaia. And, it ordered the Brazilian State to investigate and prosecute those responsible for the crimes.²

With regards to the Amnesty Law, the Court argued that: "The provisions of the Brazilian Amnesty Law that prevent the investigation and sanctioning of severe human rights violations are incompatible with the American Convention, have no legal effects and cannot continue to stand in the way of investigating the facts of this case."

¹ CEJIL, the Americas/Human Rights Watch, the Grupo Tortura Nunca Mais (GTNM/RJ) and the *Comissão de Familiares de Mortos e Desaparecidos Políticos de São Paulo* [Committee of the Families of Those Who Died or Disappeared for Political Reasons] (CFMDP/SP)

² In *Gomes Lund v. Brazil*, the Inter-American Court found that Brazil violated its obligations under the American Convention, including the rights to life, liberty, and personal security (Articles 1, 4, and 7), juridical personality (Article 3), humane treatment (Article 5), fair trial (Article 8), and judicial protection (Article 25) by forcibly disappearing the victims and withholding access to truth and information from their families.

The Court, then, ordered the Brazilian state to remove all practical and judicial obstacles to investigating the crimes, to establishing the truth as well as the responsibility of those involved. The Court also emphasised the right to access information, including the principle of maximum disclosure and the need to justify any refusal to provide information.

These elements of the ruling were widely expected and are in line with the increasingly robust jurisprudence of the Inter-American Human Rights System on amnesty laws.

The *Gomes Lund* ruling makes Brazil the fourth country in Latin America – after Peru, Chile, and Uruguay – to have its amnesty law invalidated by the Court. Only Argentina and Uruguay have, however, to date, revoked their respective amnesty laws.

Implications for Transitional Justice in Brazil

What are the implications of the Court ruling for transitional justice in Brazil?

First, it needs to be recognized that a number of measures have been taken by successive Brazilian governments in the area of transitional justice, particularly in the area of reparations. Presidents Cardoso and Lula both emphasised limited truth efforts and compensation to victims.

With regards to the amnesty law and demands for accountability, in April 2010 the Brazilian Supreme Tribunal upheld the amnesty law in a ruling just a few months before the Inter-American Court's judgement in *Gomes Lund*. It should be noted however, that in its 7-2 vote the Tribunal considered the amnesty law to be primarily a political matter, and it recommended that the Brazilian Congress take up the issue and attempt to overturn the law. The decision by the Tribunal could therefore be interpreted as not constituting an insurmountable barrier for Brazilian political forces to carry out the ruling of the Inter-American Court. Moreover, the current President of the Tribunal, Joaquim Barbosa, suggested in a recent interview that there is scope for reinterpretation of the Amnesty Law by the Tribunal should the Law come before it once more.

This raises the question: *does Brazil have to overturn its amnesty law to comply with the Gomes Lund ruling?* The simple response to that question is: not necessarily. After all, it could be argued that there might be ways to circumvent amnesty laws and to mitigate for the impunity effects that such laws may have. Indeed, there are examples in Latin America where transitional justice proceeds without amnesty laws being overturned – e.g. as demonstrated, to some extent, in Chile, and in Argentina prior to the latter's overturning of its amnesty laws.

And yet, there is a certain momentum building up in Latin America against amnesty laws. Both Argentina and Uruguay have overturned their amnesty laws. Moreover, the Inter-American Court's judgment requires Brazil to ensure that the Amnesty Law does not preclude the investigation and punishment of human rights violations committed during the military regime and to establish legislation criminalizing forced disappearances. This is likely to be a tall order in the absence of, at the minimum, some quite significant re-interpretation of the provisions of the Amnesty Law by the Brazilian judiciary.

This raises the further question: *does Brazil have to conduct trials to comply with the Inter-American Court ruling?* Again, not necessarily. Trial justice is only one form of accountability. Indeed, transitional justice advocates may need to think carefully about the conditions under which amnesty laws can 'work' as accountability mechanisms.

But, can amnesties be designed in ways to ensure their potential as conflict resolution mechanisms, while at the same time avoiding their all too common impunity effects? In my view, the onus of justification here is on those who support maintaining the Amnesty Law to show that it does not constitute a shield to protect perpetrators unjustifiably. This is of particular importance given the normative presumption against impunity that has strengthened across Latin America, and beyond the region, in recent decades.

In the case of *Gomes Lund* more specifically, a strong case can be made that the responsibility lies with the Brazilian government to demonstrate that any transitional justice measure it implements – such as the Truth Commission – advances accountability.

In terms of the Truth Commission, the details therefore are important.

Many have pointed out that the mandate of the Commission is limited. It will work for two years and is composed of seven members chosen by the President. It has the power to call witnesses to investigate abuses committed both by the military and by guerrillas. But, it has no prosecutorial powers.

Yet, for many any official transitional justice initiative is better than none. Many transitional justice advocates argue that the creation of the Commission constituted a major advance and it was welcomed as such. For some, the Commission could provide an important catalyst for truth and accountability efforts in Brazil. And its report could offer an authoritative contribution to the construction of the country's recent past.

Significant question marks remain however. The Commission has low visibility and its work remains disconnected from broader society. Its working methodology appears not to be sufficiently well defined. And there are splits within the Commission with regards to its

objectives and purposes. On the one hand, there are those who see the Commission as a catalyst for participation and as a platform for societal mobilisation and for victims. On the other there are those who see the role of the Commission as primarily being about an objective quasi-judicial evaluation of evidence and witness statements and the production of an authoritative report on the Commission's findings at the end of its mandate. There are indeed strong arguments in favour of both models, but the main point here is that it still does not seem clear to the Commissioners themselves what role the Commission should have.

And, in line with the Amnesty Law, it will have no powers to investigate or condemn suspects. In terms of compliance with the *Gomes Lund* ruling of the Inter-American Court, therefore, the Commission will not be enough.

Beyond *Gomes Lund*

In closing, looking beyond the specifics of the *Gomes Lund* ruling, what are some of its broader implications? And what does the Brazilian government's response tell us about the prospects for and limitations on Brazilian post-transitional justice, and, I would add, Brazilian democracy.

In my remaining time, I can only be very schematic here, but I would like to conclude with four points:

First, the *Gomes Lund* case has highlighted some of the continuing tensions in ***Brazilian civil-military relations***. True, the Brazilian military's long-held opposition to a Truth Commission has eased somewhat since the Supreme Court upheld the interpretation of the country's 1979 Amnesty Law, which protects suspected torturers from facing trials. By implementing the Inter-American Court ruling therefore, the Brazilian government has the opportunity to further strengthen civilian control over military affairs.

This is also related to my second point. One of the most important aspects of *Gomes Lund* is the affirmation of ***victims' right to the access of information***. The Brazilian government, the ruling stated, "is required to continue developing initiatives for the search, systematization, and publication of all information about the Araguaia guerrilla, along with information relating to human rights violations that occurred during the military regime, and guarantee access to this information." The *Gomes Lund* ruling appears to have fed into important legislative debates in Brazil that led to the entry into force of a new Access to Information Law in May 2012.

In particular, complying with *Gomes Lund* could strengthen the very crucial cluster of rights regarding state accountability, transparency, freedom of information, and the right to truth in Brazil. It would shift the responsibility to the state to provide public justifications for why files should remain classified.

My third point is related to the broader relationship between ***Brazil and the Inter-American Human Rights System***, and compliance with international human rights by the Brazilian state more generally. There is a strong argument for why the Brazilian government needs to take the Inter-American Human Rights System seriously, in the *Gomes Lund* case, but also in other cases.

In relation to *Gomes Lund*, the Brazilian government has been fairly responsive. In the immediate aftermath of the ruling, Paulo Vannuchi, Brazil's then Secretary for Human Rights, called the court's decision "very important to continuing to develop human rights" in Brazil. "We need to find the bodies of those resistance fighters and return them to their families," Vannuchi said; "[t]his is indispensable to talking about democratic reconciliation, about being one united country."

Yet, this attitude has not always characterised the Brazilian government's policy towards international human rights. For example, the way the Brazilian government responded to the Inter-American Commission's interim measures in the case of Belo Monte has been damaging – both for Brazil and for the Inter-American System itself. The Inter-American Commission adopted interim measures in April 2011 to request Brazil to halt the construction of the Belo Monte dam. The response by the government was very swift when it decided to suspend its annual contribution to the human rights body. It also withdrew the former Human Rights minister, Paulo Vannuchi's candidacy to become member of the Inter-American Commission.

Now, does this matter? Well, the relationship with the Inter-American System matters because partly what it means for a 'rising state' to engage internationally is to be able to accept external scrutiny, and respond to such scrutiny constructively and responsibly. After all, in the case of *Gomes Lund*, what we are talking about here is whether it was legitimate for the Brazilian state to disappear, torture and extra-judicially execute its citizens. These are of course events of the past, but it is up to the Brazilian government in the present to attempt to repair the harm done and, crucially, put in place preventive mechanisms and institutions that ensure that similar acts are not committed in the present.

Finally, the fourth point, the Brazilian government's response to *Gomes Lund* matters, for many, in terms of what it reveals about the ***character of Brazil's leadership*** both regionally and globally. The absence of Brazilian regional leadership is particularly noteworthy in the

area of transitional justice. In many ways, Brazil is behind the regional curve when it comes to transitional justice.

Beyond Latin America, it could be argued that the international dimensions of its human rights obligations are particularly important for Brazil. The Brazilian government seeks to play a more prominent international role in the areas of conflict prevention and resolution. And it seeks to insert itself as an international norm entrepreneur with regards to, for example, its notion of 'responsibility while protecting'.

The connections here between what the Brazilian government says and does at home, and what it says and does abroad, are significant. Indeed, many make explicit links between the Brazilian government's lack of progress on transitional justice – and its support for international human rights more generally - *and* its potential for regional and global leadership.

No matter what you think about the merits of such arguments, the important point here is that they are being made, and the expectations on Brazil that they highlight are only likely to increase.

Thank you.